IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HARGRAVES	:	
	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 05-CV-4759
	:	
CITY OF PHILADELPHIA, ET AL.	:	
	:	

SURRICK, J. **APRIL 26, 2007**

MEMORANDUM & ORDER

Presently before the Court is Defendants City of Philadelphia, Sylvester Johnson, and Joseph O'Donnell's Partial Motion To Dismiss Plaintiff's Complaint (Doc. No. 4). For the following reasons, Defendants' Motion will be granted.

I. FACTUAL BACKGROUND

We note at the outset that both the facts of this case and the legal arguments were difficult to decipher because Plaintiff's Complaint and the subsequent pleadings were almost incomprehensible.[1] From what we can glean, the case appears to be based upon the following set of facts.

[1] Plaintiff's counsel's typos and indecipherable written court submissions have been commented on before in this District. *See Devore v. City of Phila.*, No. Civ. A. 00-3598, 2004 WL 414085, at *2 (E.D. Pa. Feb. 20, 2004). Magistrate Judge Hart noted that counsel's written work was "careless, to the point of disrespectful," could be described as "vague, ambiguous, unintelligible, verbose and repetitive," and caused the court "to expend an inordinate amount of time deciphering the arguments and responding accordingly." *Id.* The same can be said for Mr. Puricelli's submissions in this case.

Plaintiff, John Hargraves, a black male, began his employment as a police officer with the City of Philadelphia Police Department in January 1995. (Doc. No. 1 at 2.) Plaintiff contends that he was fired unjustly and denied pre-termination due process rights because of his race. (*Id.* at 1.) At the time of his termination, Plaintiff was a member of the police Narcotics Strike Force ("NSF"). (*Id.*) Between February 16, 2000 and May 20, 2000, seized drug money disappeared from police custody. (*Id.* at 5.) Some of this money had been seized and recorded by Plaintiff. (*Id.*) Defendants initiated an investigation to determine what had happened to the money but after two years of investigating, reached no conclusion. (*Id.*) During the course of the investigation, Plaintiff was reassigned out of the NSF. (*Id.*) Approximately four months later, additional drug money was lost when a safe holding seized money was stolen. (*Id.* at 6.)

On September 9, 2003, Plaintiff was arrested and charged with theft. (*Id.*) At that time, he was given *Miranda* warnings and declined to speak with officers of the Internal Affairs Division. (*Id.*) On the same day, Plaintiff was suspended from his NSF position. (*Id.*) On September 29, 2003, Plaintiff received a "notice of intent to terminate," and on October 8, 2003, Plaintiff was terminated. (*Id.*)

Plaintiff alleges that he properly followed police practice and procedure in securing money seized by NSF officers. (*Id.*) Plaintiff contends that he recorded relevant information on the property receipt, turned over part of the receipt to the District Captain, entered the information into the police computer, forwarded the computer entry to the property room, and then transferred the receipts and money to the property room via another officer. (*Id.* at 6-7.) Plaintiff alleges that he was terminated based on an unproven allegation of theft. (*Id.* at 7.) He further contends that while he was suspended and fired as a result of missing money, white

officers who had used the same police practices to report and transfer seized money and whose money had also disappeared were not suspended or fired. (*Id.* at 8.) In addition, Plaintiff alleges that he faced suspension and termination without the opportunity to respond to the administrative charges while white officers who faced the same situation were afforded such opportunities. (*Id.*) Plaintiff contends that Defendants' actions were intended "to deprive him and other police officers under color of state law of civil rights, and right to property, due process, liberty, equal protection of law, and reputation." (*Id.* at 10.)

Plaintiff filed a Complaint on September 6, 2005, alleging two claims. (*Id.* at 10-17.) Count I alleges claims under 42 U.S.C. § 1983 and contends that "[D]efendants discriminated against the [P]laintiff due to race and deprived the Plaintiff of equal protection of law and due process, because of his race, and/or retaliated against the Plaintiff for lawful and constitutionally protected activities, such as performing his police duties and following the established practice of the City and its police department to secure the seized money."[2] (*Id.* at 10.) Count II asserts a "1983 Monell Claim," alleging that "the conduct of the defendants was done under a policy custom, practice of the City of Philadelphia and/or its Police Department, which policy, practice

[2] Plaintiff's Complaint includes five pages of ambiguous and repetitive assertions concerning this Count but does not contain a clear statement of the specific claims he is alleging under § 1983. "Section 1983 is not, however, a source of substantive rights. It provides a remedy only, and the substantive right must be found in the Constitution or federal laws." 13B Wright & Miller, Federal Practice and Procedure § 3573.2 (2d ed. 2007); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) ("Section 1983 merely provides a mechanism for enforcing individual rights secured elsewhere, i.e., rights independently secured by the Constitution and laws of the United States. One cannot go into court and claim a violation of § 1983—for § 1983 by itself does not protect anyone against anything." (internal quotations omitted)).

or custom was designed and intended to discriminate against officers in employment and their race, or to retaliate for engaging in law and/or protected activities."[3] (*Id.* at 16.) On October 27, 2005, Defendants filed a Partial Motion to Dismiss Plaintiff's Complaint (Doc. No. 4). Plaintiff filed a Response in Opposition the same day (Doc. No. 5) to which Defendants replied on November 1, 2005 (Doc. No. 6). Finally, Plaintiff filed a "Sir Response [*sic*]" on November 1, 2005 (Doc. No. 7).

II. LEGAL STANDARD

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." *Markowitz v. Ne. Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990) (citing *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988)); *see H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). District courts disfavor Rule 12(b)(6) motions. *Kuromiya v. United States*, 37 F. Supp. 2d 717, 722 (E.D. Pa. 1999). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc.*, 492 U.S. at 249-50 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73

[3] Like § 1983, a *Monell* claim does not itself constitute a violation of a substantive right. *Monell v. Department of Social Services*, 436 U.S. 658 (1978), provides that local governments can be sued if the action that is alleged to be unconstitutional implements or executes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or if the constitutional deprivation occurs pursuant to "governmental custom." *Id.* at 690-91. It is a means by which a plaintiff can sue a local government under § 1983 and is not itself a substantive claim.

(1984)); *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). However, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

III. LEGAL ANALYSIS

A. Title VII Claims

Defendants assert that Plaintiff's race discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, must be dismissed because Plaintiff does not have an EEOC or PHRC Right-to-Sue Letter and failed to pursue administrative remedies. (Doc. No. 4 at 5-6.) In addition, Defendants assert that Plaintiff fails to state a claim of retaliation. (*Id.* at 6-7.) Plaintiff responds that he has not asserted a race discrimination or retaliation claim under Title VII. (Doc. No. 5 at 4-5.) Accordingly, there is no need to address arguments concerning claims under Title VII.[4]

B. Intentional Infliction of Emotional Distress Claim

While it is unclear whether Plaintiff intended to plead a claim for Intentional Infliction of Emotional Distress ("IIED"), Defendants argue, out of an "abundance of caution," that if pled, this claim must be dismissed. (Doc. No. 4 at 9.) Defendants contend that Plaintiff has not properly pled a claim for IIED because, under Pennsylvania law, race discrimination does not constitute outrageous conduct.

Plaintiff argues that he has "pleaded an intentional act by the defendants to retaliate against him for protected activities and because he is African American." (Doc. No. 5 at 6.)

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[4] Defendants have undoubtedly raised these arguments regarding Title VII claims because of the difficulty in deciphering Plaintiff's Complaint.

Thus, Plaintiff suggests he has pled a claim for IIED. Plaintiff states: "In this day and age, it is not hard to say this conduct is outrageous. If so, an intentional infliction of emotion [*sic*] distress claim is stated." (Doc. No. 5 at 6.)

To state a claim for intentional infliction of emotional distress, Plaintiff must show that Defendants' conduct was: (1) extreme and outrageous; (2) intentional or reckless; and (3) caused severe emotional distress. *Dingle v. Centimark Corp.*, Civ. A. No. 00-6418, 2002 WL 1200944, at *8 (E.D. Pa. June 3, 2002). Initially, a court must determine whether the conduct alleged is so outrageous and extreme as to permit recovery. *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988). To establish liability, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.*; *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1988). The Third Circuit has recognized that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." *Cox*, 861 F.2d at 395.

Courts in this District have repeatedly found that racial discrimination alone does not meet the "extreme and outrageous conduct" standard necessary to state a claim for intentional infliction of emotional distress. *See Harry v. City of Phila.*, No. Civ. A. 03-661, 2004 WL 1387319, at *15 (E.D. Pa. June 18, 2004) (holding racial discrimination and retaliation, even if proven, do not rise to the requisite level of extreme and outrageous); *Barbosa v. Tribune Co.*, No. Civ. A. 01-CV-1262, 2003 WL 22238984, at *6 (E.D. Pa. Sept. 25, 2003) (finding racial discrimination and work-related harassment insufficient for IIED claim); *EEOC v. Victoria's Secret Stores Inc.*, Civ. A. No. 02-6715, 2003 U.S. Dist. LEXIS 1290, at *5-6 (E.D. Pa. Jan. 13,

2003) (finding hostile work environment and racial discrimination insufficient for IIED claim); *Watkins v. Pa. Bd. of Probation & Parole*, No. 02CV2881, 2002 U.S. Dist. LEXIS 23504, at *25 (E.D. Pa. Nov. 25, 2002) (finding that racial discrimination, retaliation, and work-related harassment are insufficient for IIED claim); *EEOC v. Chestnut Hill Hosp.*, 874 F. Supp. 92, 96 (E.D. Pa. 1995) (finding racial discrimination insufficient for IIED claim); *Parker v. DPCE, Inc.*, No. Civ. A. 91-4829, 1992 WL 501273, at *14 (E.D. Pa. Nov. 3, 1992) (dismissing claim for intentional infliction of emotional distress arising from racially discriminatory termination and retaliation (citing *Aiken v. Bucks Ass'n for Retarded Children*, No. Civ. A. 91-2672, 1991 WL 243537, at *7 (E.D. Pa. Apr. 12, 1990))); *Nichols v. Acme Markets, Inc.*, 712 F. Supp. 488, 495 (E.D. Pa. 1989), *aff'd*, 902 F.2d 1561 (3d Cir. 1990) (finding racial discrimination alone does not satisfy the requirements necessary to state a claim for intentional infliction of emotional distress under Pennsylvania law).

Given that Plaintiff's claim for IIED is premised on a race discrimination and retaliation claim, "it is clear that even if Plaintiff proves that these actions were motivated by discriminatory animus, '[t]hese acts, while deplorable, do not constitute extreme and outrageous conduct as Pennsylvania has defined those terms.'" *Harry*, 2004 WL 1387319, at *15 (quoting *Clark v. Falls*, 890 F.2d 611, 624 (3d Cir. 1989)); *see also Smith-Cook v. AMTRAK*, No. Civ. A. 05-00880, 2005 U.S. Dist. LEXIS 27297, at *33 n.16 (E.D. Pa. Nov. 10, 2005) (finding it unclear how the acts of racial discrimination and retaliation would rise to the requisite level of outrageousness). Plaintiff points to no other conduct as a basis for this claim. Accordingly, we are compelled to dismiss Plaintiff's claim for IIED.

C. Retaliation Claim under 42 U.S.C. § 1983

Defendants argue that Plaintiff's § 1983 retaliation claim must be dismissed because Plaintiff has not alleged that he was engaged in protected activity.[5] (Doc. No. 6 at 4.) To state a claim for retaliation under § 1983, a plaintiff must show: (1) that he or she was engaged in a protected activity; and (2) that "the protected activity was a substantial or motivating factor in the alleged retaliatory action." *Townes v. City of Phila.*, No. Civ. A. 00-CV-138, 2001 WL 503400, at *4 (E.D. Pa. May 11, 2001).[6] The first prong presents a question of law, and the second prong presents a question of fact. *Hill v. Borough of Kutztown*, 455 F.3d 225, 241 (3d Cir. 2006). A court determines whether activity is protected by weighing "the interest of the employee as a citizen, commenting upon matters of public concern against the interest the government has in the efficiency of the public services it performs." *Mraz v. County of Lehigh*, 862 F. Supp. 1344, 1348 (E.D. Pa. 1994) (internal citations and quotations omitted). Whether a public employee's conduct or speech is a "matter of public concern" depends on the "content, form and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48

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[5] Defendants initially argued that Plaintiff's Title VII retaliation claim should be dismissed. After Plaintiff clarified that he did not intend to bring such a claim under Title VII but intended only to bring a retaliation claim under § 1983, Defendants, in their Reply to Plaintiff's Response, newly argued that any retaliation claim under § 1983 must also be dismissed because Plaintiff did not allege that he engaged in any protected activity. (Doc. No. 6 at 4.) In response, Plaintiff argues that all grounds for dismissal must be raised in the initial Motion to Dismiss and that as a result, this new argument is not properly before the court. (Doc. No. 7 at 3 n.1.) However, given the incomprehensible nature of Plaintiff's Complaint, it was impossible to determine what claims Plaintiff intended to plead without later clarification. Consequently, we will consider Defendants' argument concerning the failure to allege protected activity.

[6] Absent clarification to the contrary, we assume that Plaintiff brings the retaliation claim under § 1983 and the First Amendment, and we analyze the claim under that framework.

(1983); *see also Green v. Phila. Hous. Auth.*, 105 F.3d 882, 885-86 (3d Cir. 1997). A matter is of public concern if it relates to "broad social or policy issues" or the "way in which a government office [serves] the public." *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 397-98 (3d Cir. 1992). An activity is not a protected activity, however, when "a public employee speaks not as a citizen upon matter of public concern, but instead as an employee upon matters only of personal interest." *Townes*, 2001 WL 503400, at *4 (citing *Connick*, 461 U.S. at 147).

In this case, Plaintiff alleges that he was retaliated against for "lawful and constitutionally protected activities, such as performing his police duties and following the established practice of the City and its police department to secure the seized money." (Doc. No. 1 ¶ 33.) Plaintiff explains:

> It is the argument of the plaintiff that engaging in lawful employment as a police officer and making lawful arrest[s] of drug dealers and then accounting for seized money through the use of established work rules is protected activity. In other words, the activity is activity a police employee should not be fearful will lead to the police officer's arrest or termination, because he is empowered by state law to make arrests and sized [*sic*] derivative contraband (money earned from the sale of drugs). When a police officer arrests a drug dealer and takes the drug dealer's money, then reports the seized money in accordance with police rules, this is protected activity for which the officer should not be fired or arrested. If so, a First Amendment retaliation claim has been stated, because this is what is alleged in the complaint.

(Doc. No. 7 at 3-4.)

Contrary to Plaintiff's argument, the mere performance of job duties, in this case, making arrests and following police procedure in reporting drug money, are simply not protected activities. *See Tierney v. Quincy Sch. Dist. No. 172*, 125 F. App'x 711, 716 (7th Cir. 2005) ("[A] public employee who takes action solely for the purpose of carrying out her job duties does not

engage in protected speech for First Amendment purposes."); *see also Gonzalez v. City of Chi.*, 239 F.3d 939, 942 (7th Cir. 2001)[7] ("Speech which is made in all respects as part of the employee's job duties is generally not protected expression of the public employee."); *Cf. Hutchins v. Wilentz*, 253 F.3d 176, 194 (3d Cir. 2001) (finding in context of False Claims Act and qui tam action that employee must make clear that his actions go beyond mere performance of job duties to constitute protected conduct). Plaintiff has failed to allege anything beyond the performance of his obligatory job duties.[8] Consequently, Plaintiff's bald assertions of retaliation, without more, fail to state a proper claim for relief and we are compelled to dismiss Plaintiff's § 1983 retaliation claim.

IV. CONCLUSION

For the foregoing reasons, Defendants' Partial Motion for Summary Judgment will be granted. We will dismiss Plaintiff's claims for IIED and for retaliation under § 1983. Plaintiff's only remaining claim,[9] which appears to be based on discrimination because of race, alleges

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[7] The Third Circuit has expressed some disagreement with *Gonzalez* but only in the context of a plaintiff whose protected activity was the performance of an internal investigation that attempted to expose "wrongs and abuses within the county government." *Baldassare v. New Jersey*, 250 F.3d 188, 197 (3d Cir. 2001). In this context, the Third Circuit focused its analysis on the "value of the speech itself" and found the speech to be protected activity because it clearly addressed a "matter of public concern." *Id.* However, in the instant case, Plaintiff's alleged protected activity is nothing more than the mere performance of his job duties, making lawful arrests and accounting for seized drug money. He alleges nothing that would constitute speech or conduct that addresses a matter of public concern.

[8] For example, Plaintiff does not allege that he was retaliated against for bringing a lawsuit against the City of Philadelphia. *See Hill v. City of Scranton*, 411 F.3d 118, 126 (3d Cir. 2005) (finding that any lawsuit brought by an employee against a public employer qualifies as a protected "petition" under the First Amendment so long as it is not "sham litigation").

[9] Given the difficulty in understanding Plaintiff's Complaint, the equal protection/due process claim under § 1983 is the only other claim that we can decipher.

equal protection and due process violations under § 1983.[10]

An appropriate Order follows.

[10] Defendants argue that punitive damages against the City are unavailable to Plaintiff as punitive damages are not recoverable against a municipality under Title VII. As discussed above, there are no Title VII claims here, and Plaintiff's only remaining claim arises under 42 U.S.C. § 1983. Punitive damage claims are also barred against municipalities and officials in their official capacities under § 1983. *Mitros v. Cooke*, 170 F. Supp. 2d 504, 507 (E.D. Pa. 2001) (citing *City of Newport v. Fat Concerts, Inc.*, 453 U.S. 247, 271 (1981)); *see also Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir. 1988). Thus, punitive damages cannot be recovered from Defendants in their official capacities, and we will strike Plaintiff's prayer for punitive damages against the City and against Defendants in their official capacities. A plaintiff may, however, recover punitive damages from a defendant in his or her individual capacity if the defendant's actions are motivated by "evil motive or intent, or [if the action] involves reckless or callous indifference to the generally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Graham v. Hoffer*, No. Civ. A. 1:CV-05-2679, 2006 WL 3831375, at *4 (M.D. Pa. Dec. 28, 2006) (explaining that *Smith* allows for punitive damages against individual defendants in their personal capacities only). Since Plaintiff has stated claims against Defendants in their individual capacities we will not strike that claim for punitive damages.

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ORDER

AND NOW, this 26th day of April, 2007, upon consideration of Defendants City of Philadelphia, Sylvester Johnson, and Joseph O'Donnell's Partial Motion To Dismiss Plaintiff's Complaint (Doc. No. 4), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that the Motion is GRANTED.

IT IS SO ORDERED.

BY

THE COURT:

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R. Barclay Surrick, Judge